

FCC MAIL SECTION

Federal Communications Commission

DA 99-1142

JUN 16 3 48 PM '99

Before the  
 DISPATCHED Federal Communications Commission  
 Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),  
 Table of Allotments,  
 FM Broadcast Stations.  
 (Mason, Texas)

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MM Docket No. 99-215  
 RM-9337

## NOTICE OF PROPOSED RULE MAKING

Adopted: June 2, 1999

Released: June 11, 1999

Comment Date: August 2, 1999

Reply Date: August 17, 1999

By the Chief, Allocations Branch

1. Before the Commission for consideration is a Petition for Rule Making filed by BK Radio proposing the allotment of Channel 239C2 at Mason, Texas, as a second local FM broadcast service.<sup>1</sup> BK Radio requests that Channel 239C2 be allotted to Mason in order that it may amend its pending application for Channel 249C2 at Mason (File No. BPH-960823MF) to specify Channel 239C2 without loss of cut-off protection. BK Radio states its intention to amend its pending application for Channel 249C2 to specify operation on Channel 239C2 if allotted to Mason, Texas, with the requested cut-off protection.

2. In support of its request, BK Radio states that the allotment of Channel 239C2 will eliminate the mutual exclusivity between its application and two other applications for a new class C2 channel at Mason, Texas. BK further states that its proposal is consistent with the Commission's policy to resolve conflicts between applicants to provide the community with additional FM transmission service. *Copeland, Kansas*, 5 FCC Rcd 7682 (1990). BK Radio notes that by allotting Channel 239C2 to Mason with cut-off protection for its application, the application may be granted. In regard to the remaining two applications for the Channel 249C2 allotment, BK Radio points out that Channel 273C2 is available for either Foxcom, Inc. (File No. BPH-960826MH) or Jayson D. Fritz and Janice M. Fritz (File No. BPH-960826MS) for operation at Mason and one of those applications could be modified to specify operation on Channel 273C2

<sup>1</sup> BK Radio originally requested that its application be amended to specify operation on Channel 273C2. On January 5, 1999, BK Radio amended its petition for rule making requesting that its application be amended to specify operation on Channel 239C2 in lieu of Channel 273C2.

and afforded cut-off protection while the remaining applicant would retain Channel 249C2. BK Radio also states that Channels 288C2 and 245C2 can be allotted to Mason, Texas. BK urges adoption of its proposal, arguing that significant public interest reasons exist which would warrant the grant of this proposal including resolving the current conflict between three mutually exclusive applications and permitting the prompt institution of service to Mason, Texas. *Albion, Nebraska*, 10 FCC Rcd 3183 (1995).

3. We believe the proposal warrants consideration because the proposed allotment could provide the community with additional FM broadcast service. The allotment of Channel 239C2 would allow BK to amend its application for Channel 249C2 at Mason, thereby resolving its mutual exclusivity with the other applications for that channel. Channel 239C2 can be allotted to Mason in compliance with the Commission's spacing requirements at a fully spaced site.<sup>2</sup> Since Mason is located within 320 kilometers (199 miles) of the U.S.-Mexican border, the Commission must seek concurrence of that government in the allotment of Channel 239C2. Although BK Radio states that Channels 288C2 and 245C2 can be allotted to Mason for other expressions of interest or for either of the two remaining applicants for Channel 249C2 at Mason, our staff engineering analysis indicates that currently neither channel is available.<sup>3</sup> However, Channel 273C2 can be allotted to Mason for either of the two remaining applicants.<sup>4</sup> As there is an additional equivalent class channel available for either of the two remaining applicants for Channel 249C2 at Mason, we shall propose to allow BK Radio to amend its application for Channel 249C2 to specify operation on Channel 239C2, with cut-off protection. We do caution, however, that should one of the remaining applicants request amendment of its application to specify operation on Channel 273C2 and another party express an interest in the use of Channel 273C2 at Mason, Commission policy does not allow us to modify the applications with cut-off protection. See *Cheyenne, Wyoming*, 62 FCC 2d 63 (1976). In order to provide cut-off protection for BK Radio, two additional channels are required. An additional channel is required for one of the two remaining applicants and one channel is necessary to accommodate any expression of interest from other parties.

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<sup>2</sup> The coordinates for Channel 239C2 at Mason are 30-33-24 and 99-25-34. The BK Radio application for Channel 249C2 at Mason specifies coordinates 30-33-58 and 99-06-48.

<sup>3</sup> Our analysis indicates that Channel 288C2 is short spaced to a counterproposal filed in MM Docket 97-244 which proposes the allotment of Channel 291A at Mason. See 12 FCC Rcd 21780 (1997). Using the city reference coordinates for Mason, a site could not be located for Channel 288C2 that would provide city grade coverage and meet the spacing requirements to the above-listed channel. However, the Report and Order in MM Docket 97-244 allotted Channel 224A to Mason in lieu of Channel 291A. Therefore, upon finalization of that proceeding, Channel 288C2 may be available for allotment at Mason for other expressions of interest. Channel 245C2 is short spaced to the proposed allotment of Channel 242A at Llano, Texas, and Channel 242C2, Menard, Texas, in MM Docket 95-49 (10 FCC Rcd 4193 (1995) and 12 FCC Rcd 6809 (1997)). That channel also conflicts with Station KBAL, Channel 246A, San Saba, Texas, and Station WHFI, Channel 244C1, Georgetown, Texas.

<sup>4</sup> The coordinates for Channel 273C2 at Mason are 30-38-21 and 99-20-36.

4. Accordingly, we will solicit comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Mason, as follows:

Community	Channel No.	
	Present	Proposed
Mason, Texas	249C2, 224A	224A, 239C2, 249C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 2, 1999**, and reply comments on or before **August 17, 1999**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C., 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Lee J. Peltzman  
Shainis & Peltzman, Chartered  
1901 L Street, N. W., Suite 290  
Washington, D. C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement.

Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in this proceeding.

**FEDERAL COMMUNICATIONS COMMISSION**

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204.(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties, must be made in written comments reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal communications Commission, Washington, D, C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 445 12th Street, SW., Washington, D. C.